UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK
SYRACUSE DIVISION

DAVID ZEHNER,
Plaintiff

v.

THE BOARD OF EDUCATION (the "Board") OF THE JORDAN-ELBRIDGE CENTRAL SCHOOL DISTRICT (the "District") and the following individuals who may be entitled to indemnification by the District: MARY L. ALLEY, DIANA FOOTE, JEANNE PIEKLIK, CONNIE DRAKE, PENNY L. FEENEY, LAWRENCE J. ZACHER, and WILLIAM SPECK.

Defendants

COMPLAINT

Case No.: 5:11-CV-1202
(DNH/DEP)

Jury Demand

Plaintiff, DAVID ZEHNER, through his attorneys, O'HARA, O'CONNELL & CIOTOLI, for his Verified Complaint against the Defendants, states as follows:

JURISDICTION

1. Plaintiff brings this action pursuant to Section 1983 of the Civil Rights Act of 1871, 42 U.S.C. §1983, for violation of federal Constitutional rights, including violation of his First Amendment rights to free speech and association and violation of his Fourteenth Amendment right to his liberty interest in his good name, reputation and right to earn a livelihood and pursue his career and future employment.

2. This Court has original jurisdiction under 28 U.S.C. §1331 and supplemental jurisdiction for the state causes of action under 28 U.S.C. §1367.

3. Plaintiff has complied with applicable notice of claim requirements under New York State law by serving the Defendants with a timely Notice of Claim on September 28, 2011. Annexed hereto as **Exhibit "A"** is a true and correct copy of Plaintiff's Notice of Claim with Exhibits "A" to "F" annexed thereto.

4. This action has been commenced within the time required by General Municipal Law §50-I and Education Law § 3813.

THE PARTIES AND VENUE

5. At all times relevant hereto, Plaintiff has been a resident of the Town of Elbridge in the County of Onondaga, State of New York.

6. Defendant Jordan-Elbridge Central School District (the "District") is a municipal corporation organized under the laws of New York State, with administrative offices located in the Village of Jordan, State of New York.

7. Defendant, the Board of Education (the "Board"), is the duly elected and/or governing body of the District.

8. Defendants Mary L. Alley, Diana Foote, Jeanne Pieklik, Connie Drake and Penny L. Feeney, were and/or are members of the Board during the events and circumstances which comprise the facts underlying this action.

9. Defendant Lawrence J. Zacher ("Zacher") was the Interim Superintendent of Schools of the District during the events and circumstances which comprise the facts and events of this action.

10. Defendant William Speck ("Speck") is the District Superintendent of the Cayuga Onondaga BOCES. Speck served as the Interim Superintendent of the District prior to Zacher's interim superintendency.

11. Zehner has been the Principal of the District's High School since February 2006. He received tenure effective January 31, 2009.

FACTUAL BACKGROUND

The § 3020-a Charges

12. On October 6, 2010, the Board made a finding of probable cause on charges filed against Zehner pursuant to Education Law § 3020-a. The Board has suspended Zehner pending a hearing and determination of those 3020-a charges.

13. When the 3020-a charges were brought against Plaintiff, Board President Mary Alley held a press conference and stated, in words or substance, that Plaintiff had endangered the health, safety and welfare of students. This was a completely false and scurrilous charge.

14. Plaintiff alleges, on information and belief, that these charges were brought against him not because of any misconduct or poor job performance, but because Plaintiff (a) complained to the Onondaga County Bar Association regarding Danny Mevec ("Mevec"), who was then the Board's attorney; (b) raised concerns about improper actions of certain Board members and their unwarranted and disruptive involvement in the day-to-day affairs of the District; and (c) challenged the illegal appointment of Sue Gorton as interim superintendent.

15. Plaintiff's concerns included, but were not limited to, the transfer of Janice Schue ("Schue") to the District office from her position as elementary school principal. Plaintiff openly criticized the Board's practice of replacing competent employees with friends and cronies.

16. Plaintiff's association with Schue and with William Hamilton, the District's Assistant Superintendent of Business and Finance, who is also on suspension, and Anthony Scro, the District's Treasurer, who has been terminated by the Board, have also made him the target of the Board. In fact, Plaintiff was told by the former superintendent on May 14, 2008 that "*(Y)ou need to be cautious about your alliances.*"

17. In response to Plaintiff's concerns, the Board illegally suspended him from the performance of his duties on September 20, 2010, without the filing of any charges until October 6, 2010, in violation of Education Law §§ 3020 and 3020-a. Since then, defendants have deliberately drawn out and delayed Zehner's ability to properly defend himself in the face of the District's unfounded and baseless allegations.

Plaintiff's Public Criticisms and Court Actions

18. Plaintiff has publicly challenged the Board's misconduct and abuse of power. For example, at Plaintiff's personal expense, he commenced two Article 78 proceedings to challenge the Board's repeated violations of the Open Meetings Law (Onondaga County Supreme Court Index No.: 2010-4926 and Index No.: 2010-6515). In both proceedings, the Court determined that the Board had violated the Open Meetings Law. The Court rescinded the appointment of Sue Gorton as interim superintendent, awarded attorney's fees to Plaintiff in both actions, and ordered training in the Open Meetings Law for Board members.

19. Also, as a District taxpayer, Plaintiff has spoken during the public comment portion of several Board meetings. His comments have related to matters of general public interest rather than his personal employment situation and have addressed

actions of both the Board and the interim superintendent Zacher, which are cited in the Notice of Claim at ¶ 12(c) (**Exhibit "A"**).

20. On information and belief, Plaintiff's public criticisms have caused Zacher and individual Board members to feel embarrassed and uncomfortable. Rather than responding to Plaintiff's criticisms in a rational and constructive manner, the Board and Zacher have attempted to discredit and silence Plaintiff, to undermine his credibility, to create a justification to permanently ban Plaintiff from Board meetings and school grounds, and to manufacture grounds for additional 3020-a charges.

The Board Falsely Claims that Plaintiff "Threatened" Board Members

21. One element of defendants' plan to discredit and silence Plaintiff has been to misquote Plaintiff, label those misquotes as "threats" and then publish them in the Board minutes, in order to make them "official" and public.

22. For example, the minutes of the December 1, 2010 Board meeting as initially prepared by the Board Clerk did not attribute *any* remarks to Plaintiff during the public comment portion of that meeting. The Board delayed in approving those minutes because, according to Zacher is quoted in a newspaper article on January 11, 2011, *"... at least two board members said they heard someone make 'an off-handed remark we considered a threat' at that meeting and they felt it should be documented in the minutes."* (Annexed as Exhibit "A" to the Notice of Claim). (Emphasis Added).

23. Revised minutes of the December 1st meeting were finally approved by the Board at its January 5, 2011 meeting. (Annexed as Exhibit "B" to the Notice of Claim). The sole revision was to specifically quote Plaintiff as saying, *"Mr. (Roger) Hill, you should resign. You really should resign. Some of you are going down, some are going*

down hard." The revised Board minutes do not summarize the comments of any other person who spoke during the public comment period (they simply state that nine other people spoke *"about their current concerns"*). Plaintiff was the only speaker whose comments were allegedly quoted in the revised Board minutes.

24. The Board approved the revised minutes "*as corrected*" by a vote of 9-0. (Annexed as Exhibit "C" to the Notice of Claim). In other words, seven Board members who never claimed to have heard any *"off-handed remark"* later voted to attribute a damning and defamatory statement to Plaintiff in the minutes of a Board meeting. They did so with the understanding that these minutes would be made public, reported in the media and posted on the District's website.

25. In fact, Plaintiff did *not* make the statement recorded in the minutes, and Plaintiff certainly did not physically threaten anyone. Plaintiff has informed both Zacher and the Board that he did not make that statement and no other non-Board member witnessed the alleged comment. Zacher has acknowledged that the Board does not have a recording of what Plaintiff said, but claims that *"Those minutes do not need to be an exact quote of what everybody said at the meeting"* (Exhibit "A" to the Notice of Claim), even though the Board minutes (Exhibit "B" to the Notice of Claim) quotes Plaintiff exactly, in quotations, as if it were an "*exact quote*."

26. The plan to discredit and silence Plaintiff culminated in a choreographed display of six Board members walking out of the January 19, 2011 board meeting, in which these six members (along with Zacher and Board Clerk Paula VanMinos who is also the District's Director of Operations) stood up in unison and walked out of the

meeting room at the conclusion of Plaintiff's comments, leaving about a hundred citizens and three Board members sitting in the room.

Plaintiff is Escorted out of the Board Meeting by an Armed Guard

27. On information and belief, during the private meeting of the Board following the walk-out, the Board directed a deputy sheriff to remove Plaintiff from the school building. Approximately 5½ minutes after the group had marched out of the public meeting room, the armed deputy sheriff returned to the room and publicly escorted Plaintiff from the building under the threat of arrest.

28. Of course, that act was highly publicized, as were the unfounded accusations that Plaintiff had been disruptive. In fact, the Board's attorney is quoted in a February 1, 2011 newspaper article as saying, with reference to Plaintiff, that "*He disrupted the meeting and persisted until he was escorted from the premises, and only then could the meeting resume.*" (Annexed as Exhibit "D" to the Notice of Claim). That defamatory statement is completely false. Moreover, it was published as a statement of fact by a person who was not even present at the Board meeting.

29. Zacher and the Board have violated Plaintiff's statutory tenure rights by (a) directing an armed and uniformed deputy sheriff to remove him from a public Board meeting on January 19, 2011, (b) reprimanding Plaintiff in the January 28, 2011 letter from Zacher (annexed as Exhibit "E" to the Notice of Claim), and (c) banning Plaintiff from attending any District activity or entering upon District premises without the prior "express written permission of the Superintendent or his designee." Each of these penalties is a "discipline" within the meaning of Education Law §§ 3020 and 3020-a that

cannot be legally imposed by the District without offering Plaintiff due process and the protections of the tenure law.

The Illegal Reprimand

30. Also, the January 28, 2011 letter to Plaintiff from Zacher (Exhibit "E" to the Notice of Claim) is a reprimand that castigated Plaintiff for what Zacher alleged was very serious misconduct. For example, that letter states that Plaintiff was "*extremely disruptive*" at the January 19, 2011 Board meeting; Plaintiff was "*completely unprofessional;*" that Plaintiff's actions were "*highly inappropriate*;" that Plaintiff "*violated Board protocol*;" and that Plaintiff was the "*cause of substantial disruption*" of the meeting and that the Board "*had to temporarily adjourn its business until a law enforcement officer removed [Zehner] from the premises.*"

31. Zacher's January 28, 2011 reprimand further states that Plaintiff has conducted himself "*in a highly inappropriate and unprofessional manner since October 2010*" (although Zacher was not appointed as Interim Superintendent until November 5, 2010); "*made threats against various Board members*;" and "*became disorderly*" at the October 6, 2010 Board meeting (which, again, Zacher did not attend).

32. Zacher's reprimand further states that Plaintiff has made "*personal attacks upon various board members, and administrators;*" behaved in an "*extremely disruptive and unprofessional manner*" at Board meetings; and that the "*raucous and disruptive*" behavior was "*inconsistent with the duties and responsibilities of a building principal.*"

33. Each of these defamatory statements is an indictment of Plaintiff's professional qualifications and performance and are false. Moreover, these reprimands were obviously made at the direction of the Board which was copied on the letter.

The Illegal Ban from District Premises

34. The Board banned Plaintiff from District premises indefinitely and stated that Plaintiff's "**PRIVILEGES *(sic)* TO ATTEND MEETINGS OF THE BOARD OF EDUCATION, OR ANY OTHER ACTIVITY OR FUNCTION ON SCHOOL PREMISES, {IS} REVOKED.** (In bold and caps in Exhibit "E" to the Notice of Claim). The reprimand further states that Plaintiff is "... *prohibited from entering onto school property for any purpose, except with the written permission of the Superintendent or his designee.*" This ban continues through the present without justification.

35. The forced removal from a Board meeting by an armed guard, the written reprimand and ban from District activities and premises, has each subjected Plaintiff to embarrassment, ridicule and humiliation. These acts have also damaged Plaintiff's reputation and threaten his career, status and future employment prospects.

36. Amended Charges were brought against Plaintiff on April 19, 2011, after the filing of another Article 78 Petition (Onondaga County Supreme Court Index # 2011-1346) regarding this improper discipline without due process. This act was an acknowledgment by the Board that the reprimand and discipline were illegal without underlying 3020-a charges to support them. However, the additional charges were filed only after Plaintiff had to spend his own funds to again file a Court action to force the District to afford him due process.

37. On July 22, 2011, Speck purportedly acting at the behest and request of the Board sent a letter (annexed as Exhibit "F" to the Notice of Claim) regarding Plaintiff's alleged failure to report child abuse. This was another false charge designed to give the impression that Plaintiff has endangered the safety of children. Speck also sought to put pressure on a former social worker employed by the District, Wendy West-Pidkaminy, to give a statement that can be used against Zehner, allegedly to support another set of charges and/or further retaliatory action, including a Part 83 referral to the State Education Department to support a charge of immoral character and conduct.

FIRST CAUSE OF ACTION
FIRST AMENDMENT RETALIATION

38. Plaintiff hereby incorporates all previous paragraphs as if fully set forth herein.

39. The Defendants, at all times relevant hereto, were state actors for purposes of 42 U.S.C. §1983.

40. Plaintiff is a citizen of the United States who has First Amendment rights to free speech that is protected pursuant to 42 U.S.C. §1983 and the United States Constitution.

41. Plaintiff has spoken out repeatedly on matters of public concern at Board meetings and in Court filings. In retaliation for his protected speech, Plaintiff has been subjected to false charges and accusations, false claims of endangering children, false statements of being disruptive and unprofessional and making threats to Board members, resulting in Plaintiff being forcefully removed from a Board meeting, receiving an illegal reprimand and being banned from the District.

42. As a result, Plaintiff has suffered damages in not being allowed to speak on matters of public concern at public meetings. Plaintiff has also suffered humiliation, emotional distress, mental anguish and damage to his professional reputation, career and good name, as well as financial damages and damage to his future employability and employment prospects and his ability to earn a living. Plaintiff seeks monetary damages pursuant to 42 U.S.C. §1983 and attorney's fees pursuant to 42 U.S.C. §1988.

SECOND CAUSE OF ACTION FOR FIRST AMENDMENT -FREEDOM OF ASSOCIATION-

43. Plaintiff hereby incorporates all previous paragraphs as if fully set forth herein.

44. The Defendants, at all times relevant hereto, were state actors for purposes of 42 U.S.C. §1983.

45. Plaintiff is a citizen of the United States who has First Amendment rights to free speech that are protected pursuant to 42 U.S.C. §1983 and the United States Constitution.

46. Plaintiff has the right to associate with his colleagues and with the general public within the Jordan-Elbridge community. However, Plaintiff has been banned and silenced without just cause or due process and has been forcefully removed from a Board meeting, received an illegal written reprimand and been banned from the District, in violation of his freedom of association as guaranteed by the First Amendment.

47. In addition, because Plaintiff has spoken out against the long-term transfer of Janice Schue to the District office from her position as elementary school principal, he is perceived by the Defendant as being a defender of Schue. Because of this perceived association, he and has been subjected to false charges and other retaliatory actions.

48. Finally, Plaintiff's association with William Hamilton, the District's Assistant Superintendent of Business and Finance, who is also suspended, and Anthony Scro, the District's Treasurer, who has been wrongly terminated by the District, have also made him the target of the Board in violation of his freedom of association, as guaranteed by the First Amendment.

49. As a result, Plaintiff has suffered damages in his ability to freely associate with members of the Jordan-Elbridge community and professional colleagues. He has suffered humiliation, emotional distress, mental anguish, and damage to his professional reputation, career and good name, as well as financial damages and damage to his future employability and his ability to earn a living. Plaintiff seeks monetary damages pursuant to 42 U.S.C. §1983 and attorney's fees pursuant to 42 U.S.C. §1988.

THIRD CAUSE OF ACTION
LIBERTY INTEREST – FOURTEENTH AMENDMENT

50. Plaintiff hereby incorporates all previous paragraphs as if fully set forth herein.

51. The Defendants, at all times relevant hereto, were state actors for purposes of 42 U.S.C. §1983.

52. Plaintiff is a citizen of the United States who has Fourteenth Amendment right to his liberty interest in his good name, reputation, and ability to earn a livelihood and pursue his chosen career. Plaintiff may not be deprived of these rights by individuals acting under color of state law without due process of law.

53. Plaintiff's liberty interest in his good name, reputation, and ability to earn a livelihood as a tenured public employee has been damaged by defendants, and each of them, by being banned and silenced without just cause or due process, and being

subjected to false charges and accusations, false claims of endangering children, false statements of being disruptive and unprofessional, and false allegations of making physical threats to Board members, resulting in Plaintiff being forcefully removed from a Board meeting, receiving an illegal written reprimand and being banned from the District, all in violation of his liberty interest as guaranteed by the Fourteenth Amendment to the Constitution.

54. As a result, Plaintiff has suffered damages to his good name, reputation, and ability to earn a livelihood and pursue his chosen career. He has also suffered humiliation, emotional distress, mental anguish, and damage to his professional reputation, career and good name, as well as financial damages and damage to his future employability and employment prospects and his ability to earn a living. Plaintiff seeks monetary damages pursuant to 42 U.S.C. §1983 and attorney's fees pursuant to 42 U.S.C. §1988.

AS AND FOR A FOURTH CAUSE OF ACTION SECTION 1983 – FOURTEENTH AMENDMENT

55. Plaintiff hereby incorporates all previous paragraphs as if fully set forth herein.

56. The Defendants, at all times relevant hereto, were state actors for purposes of 42 U.S.C. §1983.

57. Plaintiff is a citizen of the United States who has a Fourteenth Amendment right to liberty interest in his good name, reputation and right to earn a livelihood that is protected pursuant to 42 U.S.C. §1983 and the United States Constitution.

58. Defendants have violated Plaintiff's Fourteenth Amendment right to liberty interest in his good name, reputation and ability to earn a livelihood as herein

described by subjecting him to false charges and accusations, false claims of endangering children, false statements of being disruptive and unprofessional, and false accusations of making physical threats to Board members, resulting in Plaintiff being forcefully removed from a Board meeting, receiving an illegal written reprimand and being banned from the District.

59. As a result, Plaintiff has suffered damages as herein stated, including humiliation, emotional distress, mental anguish, and damage to his professional reputation, career and good name, as well as financial damages and damage to his future employability and employment prospects and his ability to earn a living. Plaintiff seeks monetary damages pursuant to 42 U.S.C. §1983 and attorney's fees pursuant to 42 U.S.C. §1988, from defendant Board under the Fifth Cause of Action.

FIFTH CAUSE OF ACTION
WHISTLEBLOWER – EDUCATION LAW § 3028-d

60. Plaintiff hereby incorporates all previous paragraphs as if fully set forth herein.

61. Plaintiff has reported and challenged the Board's illegal or inappropriate financial practice including the wrongful transfer of elementary school principal, Janice Schue, to a "make work" position while paying a second salary for substitute administrators to run her building.

62. Also, Plaintiff, at his personal expense, commenced two Article 78 proceedings to challenge the Board's violations of the Open Meetings Law and decisions illegally made on those occasions that had significant financial implications for the District. (Onondaga County Supreme Court Index No.: 2010-4926 and Index No.: 2010-6515).

63. Plaintiff has spoken during public comment portion of several Board meetings. His comments have included reporting on the illegal and inappropriate financial practice of retaining an amount in reserve funds that was $300,000 in excess of the amount authorized by law.

64. Plaintiff is protected by Education Law § 3028-D. However, in a retaliatory response to his raising questions regarding the Board's financial practices, the Board has subjected Plaintiff to false charges and accusations, false claims of endangering children, false statements of being disruptive and unprofessional and physically threatening a Board member, forcefully removing Plaintiff from a Board meeting, illegally reprimanding him and banning from District activities and premises.

65. As a result, Plaintiff has suffered damages including humiliation, emotional distress, mental anguish, and damage to his professional reputation, career and good name, as well as financial damages and damage to his future employability and employment prospects and his ability to earn a living. Plaintiff seeks monetary damages pursuant to 42 U.S.C. §1983 and attorney's fees pursuant to 42 U.S.C. §1988.

PRAYER FOR RELIEF

66. Based on the foregoing, Plaintiff makes demand for damages for the violations of his First Amendments rights to free speech and freedom of association, violation of his Fourteenth Amendment right to his liberty interest in his good name, reputation, and livelihood and retaliatory actions against him in violation of the New York State Education Law. Plaintiff seeks and also any and all damages for personal and psychological injury, emotional distress, loss of reputation and his good name, attorney fees under New York State law, as well as claims under Section 1983 of the Civil Rights

Act of 1871, 42 U.S.C. §1983, for violation of Plaintiff's rights under color of state law, and attorney's fees under § 1988.

Dated: October 6, 2011

s/ Stephen Ciotoli

Stephen Ciotoli, Esq.
Bar Roll No. 512228
O'HARA, O'CONNELL & CIOTOLI
Attorney for Plaintiff
7207 East Genesee Street
Fayetteville, New York 13066
(315) 451-3810

INDIVIDUAL VERIFICATION

State of New York)
) ss.:
County of Onondaga)

David Zehner, being duly sworn, deposes and says that the deponent is the Plaintiff in the within action; that deponent has read the foregoing Complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes them to be true.

____
DAVID ZEHNER

Sworn to before me this
______ day of October, 2010

____
Notary Public

INDIVIDUAL VERIFICATION

State of New York)
) ss.:
County of Onondaga)

David Zehner, being duly sworn, deposes and says that the deponent is the Plaintiff in the within action; that deponent has read the foregoing Complaint and knows the contents thereof; that the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes them to be true.

DAVID ZEHNER

Sworn to before me this
6th day of October, 2010

Notary Public

EILEEN M. MALAY
Notary Public, State of New York
Qualified in Cortland County
No. 01MA6043076
Commission Expires June 12, 20 14